Filed 4/17/19 Marriage of Haghighat CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re the Marriage of SOFIA and HAMID HAGHIGHAT.	
SOFIA HAGHIGHAT, Respondent, v. HAMID HAGHIGHAT, Appellant.	G054993 (Super. Ct. No. 05D001069) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Linda Lancet Miller, Judge. (Retired judge of the Orange Sup. Ct., assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed. Motion to dismiss denied. Motion for sanctions remanded. Request for judicial notice granted.

Law offices of Michael Leight and Michael Leight for Appellant.

Madison Harbor, Jenos Firouznam-Heidari and Fariema Nazemi for Respondent.

* * *

Hamid Haghighat appeals from a judgment concluding he hid a marital asset from his former wife, Sofia Haghighat, in their earlier marital dissolution action, and is therefore required to pay her 100% of the marital funds invested in the asset pursuant to Family Code § 1101,[1] plus interest, attorney fees and sanctions.

Sofia[2] has moved to dismiss the appeal on the ground it is frivolous and because Hamid's opening brief is deficient in several respects. However, the remedy for a seriously deficient brief is an order striking that brief, not the dismissal of the appeal itself. And less significant deficiencies, as a practical matter, simply undermine the brief's legal impact. As for frivolousness, it is rarely a justification for dismissing the appeal for a practical reason. Before we can evaluate the merits of the motion to dismiss, we first must analyze the merits of the appeal. As a result, the appeal must be effectively decided before it can be dismissed. That is the case here; we consequently deny Sofia's motion to dismiss the appeal.

Having now considered the merits, we agree with Sofia that Hamid's contentions lack merit. He claims the trial court exceeded its authority under section 1101 by awarding Sofia a sum equal to the community funds invested in the asset because the statute itself purportedly restricts her potential relief to either an "interest in

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[1] All further statutory references are to the Family Code unless otherwise indicated.

[2] As the parties share the same last name, we refer to both by their first names for the sake of clarity. No disrespect is intended.

the allegedly undisclosed asset" or an award "premised upon . . . the value of that asset." We reject that argument because the statute expressly authorizes remedies which "shall include, *but not be limited to*" those two measures (section 1101, subds. (g) and (h), italics added), and because the amount paid for an asset is presumptive evidence of its value.

Hamid's other contentions fare no better. He challenges the sufficiency of the evidence to support the judgment by (1) making conclusory assertions that are unsupported by any citation to the record, and (2) ignoring the evidence supporting it. His reliance on the statute of limitations and the doctrine of laches were both waived when he failed to appeal from the court's earlier order setting aside portions of the earlier marital dissolution judgment—a ruling he largely ignores. Hamid's assertion that Sofia's claim against him was barred by the mutual release provision incorporated into that earlier marital dissolution judgment fails because it ignores the earlier set-aside order. The judgment is therefore affirmed.

The usual remedy for a frivolous appeal is a motion for sanctions on appeal, which Sofia has requested.[3] We decline to rule on that motion. The trial court has

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[3] Sofia has also requested that we take judicial notice of four documents in connection with her claim this appeal was brought for an improper purpose. The first document is a post-trial minute order pertaining to the trial court's finding that Sofia was entitled to an award of attorney fees and sanctions. The minute order reflects this matter is on appeal and that the court's ruling on the issue will be stayed until after the appeal process is completed. The second and third documents are minute orders reflecting a jury trial waiver in a separate civil case involving Hamid, and a *motion in limine* filed in the same case, reflecting Hamid's request to prevent Sofia from testifying at the trial in that case. The fourth document is a proposed judgment in the separate civil case, which purports to incorporate the trial court's findings of fact and conclusions of law made after the trial in that civil case. We grant the request for judicial notice as to the first three documents, the first two of which reflect trial court rulings and the third of which reflects Hamid's contentions, but deny it as to the proposed judgment. Sofia also has asked us to take judicial notice of the proposed judgment for the specific purpose of establishing what findings of fact and conclusions of law were made by the trial court in that case. This document was apparently drafted by counsel. Because it was never adopted by the

already ruled that Sofia is entitled to an award of attorney fees and sanctions in this case pursuant to Family Code section 2107, subdivision (c), as part of the remedy for Hamid's misconduct, but then stayed a ruling as to the amount of those fees and sanctions until after the resolution of this appeal. On remand, the trial court shall consider and incorporate the additional expense of this appeal in calculating the appropriate amount of fees and sanctions to award to Sofia.

FACTS

The parties were married, for the second time, in May 2000, and then separated again in January 2005. Their marital dissolution case went to trial over disputed assets and other financial issues, but they entered into a settlement agreement, including a mutual release of unknown claims, before the trial concluded. In May 2009, the court entered judgment in accordance with that settlement.

In March 2013, Sofia moved to set aside the judgment, alleging that (1) Hamid had submitted incomplete schedules of assets and debts during the marital dissolution proceeding; and (2) he had misrepresented at trial both the nature and amount of a purported $700,000 loan he had made to his cousin, Hootan Daneshmand.

Sofia alleged she did not learn of Hamid's deception involving the purported loan until April 2012, when she was contacted by an attorney who represented Daneshmand in a civil lawsuit Hamid had filed against him. The attorney allegedly informed Sofia that in the civil lawsuit, Hamid claimed his supposed loan of funds to Daneshmand was actually the purchase of an ownership interest in Foothill Medical Facility (FMF), and also that the sum Hamid claimed to have invested in FMF was more than twice the amount of the "loan" he had disclosed in the marital dissolution action.

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trial court, we deny Sofia's request that we take judicial notice of it.

Sofia further alleged that in October 2012, she first learned Hamid had also failed to disclose his acquisition, during the marriage, of an ownership interest in a company named Javaher Investor, LLC (Javaher).

Sofia's motion to set aside the judgment was granted on May 24, 2013, vacating portions of the judgment.[4] In its order, the court also set the matter for a trial to address the questions of whether the marital community had an interest in Hamid's investments in FMF and Javaher, and "if so, what are the consequences which flow from those determinations?"

At the court's suggestion, the parties stipulated to the court's appointment of a forensic accountant pursuant to Evidence Code section 730, for the purpose of tracing the funds invested by Hamid in Javaher and FMF. The parties also stipulated that the accountant's report would be received into evidence.

After the accountant submitted his initial report to the court, the parties agreed that the funds Hamid had invested in Javaher were his separate property. However, the accountant did not find sufficient evidence to trace all the funds invested in FMF to separate property, and thus, the parties "agreed to accept the expert's opinion . . . that $400,000 invested during marriage could not be traced to a separate property source, subject to any evidence in rebuttal."

Following the accountant's initial report, it was determined there was "an additional $215,000 that [the accountant] had not looked at until he was subsequently assigned to [do so.]" When the accountant completed that assignment, he concluded there was insufficient evidence to trace $100,000 of those funds to separate property, and

[4] The trial court's order vacating portions of the judgment is not included in our record. However, the fact the court did so is reflected in the statement of decision it issued on January 30, 2017, following the trial that resolved the parties' disputes about the assets Hamid failed to disclose during the marital dissolution action.

while the evidence as to the remaining funds was "susceptible to two reasonable interpretations," the expert's opinion was that they were Hamid's separate funds.

In addition to receiving the court appointed accountant's report into evidence, the court also took testimony from the accountant, as well as from Sofia and Hamid, and considered other evidence submitted by the parties. At the conclusion of trial, the court took the matter under submission.

In January 2017, the court issued a detailed tentative decision, which included findings on every disputed issue identified by both parties. Among other things, the court found that Hamid "owned (purchased) a 25% interest in FMF with monies starting in 2004," and he "considered himself an owner of FMF since 2004 (even though his disclosures in the dissolution[] proceedings characterized [the] $700,000 as a 'loan' and did not disclose the rest of the funds used.)" Moreover, Hamid "disguised his over $1.5 million investment in FMF as a $700,000 promissory note to his cousin, Dr. Daneshmand and to FMF."

The court further determined Hamid "was untruthful during trial in 2008 when he testified about a loan to his cousin instead of disclosing that he had invested money in FMF," and "was also untruthful at his 2007 deposition regarding his investment and saying that he was receiving interest payment instead of profits." "[Hamid's] 2005, 2006 and 2008 written disclosures intentionally failed to disclose his investment in FMF and Javaher to [Sofia], which he had an obligation to do . . . under penalty of perjury." Hamid also "admitted during the trial herein that the $700,000 promissory note disclosed at the time of the dissolution was a 'fiction' which he presented to the court during the original trial."

The court found that Hamid also "requested that his cousin, Dr. Daneshmand, not include him as a member or interest holder in FMF until he requested otherwise." There was "evidence that [Hamid] hid documents, including bank statements and failed to disclose them upon requests by [Sofia, but later] produce[d]

some of the requested documents during this trial in response to inquiries from the expert[, which may have] caused a change in the expert's opinion." The court concluded that in this case, it "appear[ed] that [Hamid] produced a fabricated document, under oath and in response to the expert's inquiries, in an attempt to lead the expert and the court to believe that $100,000 of the funds invested in FMF can be traced to a separate property source."

It therefore "appear[ed] to the court that [Hamid] got caught in his lies and nondisclosures and . . . tried to produce things to counter this." The court warned "[t]his late production [will be] a factor when the court considers sanctions." Ultimately, the court concluded "[t]he evidence showed that [Hamid] was not able to trace $505,000 of the funds invested in FMF to his separate property and that they were invested before the date of separation."

The court found that although "[Hamid] did disclose that some funds [were] provided to FMF as a loan in the dissolution proceeding, . . . this was not and was never intended to be a loan and . . . the full amount of the investment was never disclosed, nor its true nature, and this was deliberate by [Hamid]." The court then stated "the bottom line fact [is] that [Hamid] did not disclose the facts necessary for [Sofia] to have full and complete knowledge of the financial transactions made during the marriage and before judgment to have had the ability for the CPA . . . to do his work."

The court explained that its earlier order setting aside portions of the marital dissolution judgment necessarily determined that Sofia had acted in a timely fashion in raising her claims, and that they were not barred by laches. It also made a factual finding that "when [Sofia] discovered [Hamid's] imperfect disclosures and deceit, she took action promptly. . . . She did not know that [Hamid] had lied and concealed assets [and] relied on his statements throughout the proceedings that he had fully disclosed all assets a[s] required by law."

Based on those facts, the court concluded Hamid had breached his duties pursuant to Family Code sections 721, 1101, subdivisions (g) and (h), 2104, subdivision (c), and 2105. The court noted that the remedy for a breach under section 1101, subdivision (h), "shall include, though not [be] limited to 100% of any asset undisclosed or transferred in breach of the fiduciary duty."

The court observed that "[t]here has been no testimony or finding of the current value of FMF as [Hamid] is in litigation relating thereto so the remedy sought herein is the sum of money found to be invested from the community, plus interest at the legal rate from the date of April 1, 2013, [when Sofia] filed the within action." Further, the court stated that "[c]ase and statutory law suggests that attorney fees are awardable even without a request. . . . [¶] Therefore, judgment shall be entered in favor of [Sofia] against [Hamid] in the amount of $505,000 plus interest at the legal rate from April 1, 2013. In addition [Sofia] shall be entitled to monetary sanctions and sanctions in the form of attorney fees and costs subject to proof and that issue is reserved for future hearing."

The trial court specified that its lengthy written ruling would constitute its formal statement of decision unless either party requested additional findings. Other than Sofia's request for clarification on the award of prejudgment interest, and Hamid's objection to that award, neither party requested such additional findings.[5]

The court entered judgment in April 2017, and Hamid filed his notice of appeal in May 2017. In September 2017, the court held a hearing concerning the award

[5] Sofia requested a modification as to the commencement date for prejudgment interest, and Hamid objected to any such award at all, arguing that because Sofia's claim was unliquidated, prejudgment interest was not recoverable. The trial court agreed with Hamid's legal point, but stated that its award of prejudgment interest was "in the nature of a mandatory sanction related to [Hamid's] breaches of fiduciary duty" and declined to modify the date upon which it began accruing.

of attorney fees and sanctions to Sofia. In its minute order, the court noted the pending appeal related to the judgment's provision awarding attorney fees and sanctions to Sofia. The court therefore "stay[ed] the ruling until after the appeal process is comp[l]eted."

DISCUSSION

1. *Propriety of the Remedy*

Hamid argues the court's remedy—awarding Sofia 100% of the presumptively community funds invested in FMF, plus interest—is "not authorized by" either section 1101, subds. (g) or (h). We disagree.

Subdivisions (g) and (h) of section 1101 are parallel provisions, with the first applying to any breach of fiduciary duty owed by one spouse to the other, while the second applies only in cases when "the breach falls within the ambit of Section 3294 of the Civil Code"—i.e., the statute defining the circumstances under which punitive damages can be awarded. Both provisions allow the court to award remedies that "shall include, but not be limited to, an award to the other spouse of [a percentage], or an amount equal to [that percentage], of any asset undisclosed or transferred in breach of the fiduciary duty." (Section 1101, subds. (g) and (h).) The percentage stated in subdivision (g) is 50%, and the percentage stated in subdivision (h), which incorporates the punitive damage standard, is 100%.

Hamid argues those provisions require the court to choose between only two remedies: either award a percentage "interest in" the asset itself, or award "an amount equal to" that percentage share of the asset's "value." He claims that because the court in this case did neither of those things—and indeed expressly eschewed making any finding as to FMF's "current value," its award was unauthorized by the statute.

Hamid cites no applicable authority to support his argument,[6] nor does he explain why the court's inability to determine a "current" value for FMF would preclude it from making any other value-based award. Section 1101 does not limit the court to an award based on the asset's "current" value. Instead, it assumes an asset may be valued "at the date of the breach of the fiduciary duty, the date of the sale or disposition of the asset, or the date of the award by the court." (§ 1101, subd. (g).)[7]

In this case, the presumptive value of FMF at the time of Hamid's breach—i.e., when he made his secret investment of community funds to purchase a share of that asset—is measured by the amount of community funds he secretly invested in it. (*City of Perris v. Stamper* (2016) 1 Cal.5th 576, 598 [the fair market value of an asset is the price that would be freely negotiated between a willing seller and a willing buyer].) Hamid cites *Manhattan Sepulveda, Ltd. v. City of Manhattan Beach* (1994) 22 Cal.App.4th 865 (*Manhattan Sepulveda*), for the proposition that "the amount of money used to acquire an asset . . . is no evidence of 'value."' But the issue in *Manhattan Sepulveda* is whether the word "value" as used in a municipal code provision refers to a building's "fair market

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[6] *Bono v. Clark* (2002) 103 Cal.App.4th 1409, 1430 (*Bono*) is the only case Hamid cites in support of his assertion that no monetary remedy can be awarded under section 1101, subdivisions (g) and (h), absent evidence of the asset's value. *Bono* has no bearing on the issue, and Hamid has mischaracterized the case in both his opening and reply briefs. The *Bono* court was not considering the imposition of a sanction relating to the disputed asset (a truck) pursuant to section 1101. Instead, the issue there was whether the trial court had erred by adopting the value placed on the truck by the deceased husband's executor, rather than the value argued for by the wife.

[7] Hamid incorrectly asserts that the court "did not determine the value of [FMF]" at all. That argument ignores the well-established rule that we must infer whatever findings necessary to support the court's judgment, unless the court has explicitly stated otherwise. (*Fladeboe v. American Isuzu Motors Inc.* (2007) 150 Cal.App.4th 42, 48 ["the reviewing court will infer the trial court made every implied factual finding necessary to uphold its decision, even on issues not addressed in the statement of decision"].)

value" or it's "replacement cost." (*Id*. at p. 869.) Hence, the case has no bearing on the issue of whether the price Hamid paid for FMF could be relied upon to infer its value at that time. It can.

Because the trial court was justified in using the price Hamid paid to secretly purchase an interest in FMF as a proper measure of that asset's value at the time, its award of an amount equal to 100% of the community property funds used in the purchase falls within the parameters of Hamid's interpretation of available remedies under section 1101, subdivision (h).

In any case, we also reject Hamid's unduly restrictive interpretation of the statute. As he acknowledges, section 1101 specifies that the available remedies for a breach would "include, *but not be limited to*," the award of a percentage interest in the asset or its equivalent value. (§ 1101, subds. (g) and (h), italics added.) Hamid dismisses that statutory language as "[m]eaningless," and claims it "does not give the trial court . . . license to provide a remedy that does not have its origin in a division of the asset or in the value of the asset." During oral argument, Hamid's counsel provided no binding authority to support this position; likewise, we have found none.

Hamid relies on a Federal case which suggests that the phrase "including but not limited to" can at times be ambiguous (*Shelby County State Bank v. Van Diest Supply Co.* (7th Cir. 2002) 303 F.3d 832, 837-838 [finding both sides' interpretations of the provision incorporating the phrase to be '"commercially reasonable,"' but ultimately construing it against the drafter]); and to a New Hampshire case that states that under New Hampshire law, "[w]hen the legislature uses the phrase 'including, but not limited to' in a statute, the application of that statute is limited to the types of items therein particularized." (*In re Clark* (N.H. 2006) 910 A.2d 1198.) Neither citation is persuasive here.

Ultimately, Hamid asserts that section 1101's provision for remedies that would "include, but not be limited to" the two specified measures means the allowable remedies actually are limited to those specific measures. We reject that assertion because that is not what the statute says.

2. *Sufficiency of the Evidence*

Hamid next argues the judgment must be reversed "because the only evidence introduced in the trial court was conclusive that the only monies available to acquire an interest in FMF were from [his] separate property." (Initial capitalization and underlining omitted.)

In making this argument, Hamid ignores the requirement that "[a] party who challenges the sufficiency of the evidence to support a finding must set forth, discuss, and analyze all the evidence on that point, both favorable and unfavorable" (*Doe v. Roman Catholic Archbishop of Cashel & Emly* (2009) 177 Cal.App.4th 209, 218), and the requirement that all factual statements contained in a brief must be supported by citations to the record. (Cal. Rules of Court, rule 8.204(a)(1)(C).)

Hamid's thirteen bullet-pointed assertions of "uncontradicted" evidence are unaccompanied by any citation to the record, nor are they cross-referenced to any contention made in his statement of facts. His allegations are also conclusory and self-serving: e.g., Hamid baldly asserts that "[his] testimony that all monies that he contributed to FMF were from his separate property was uncontradicted" and that "[t]he exhibits that he submitted proved that his acquisition of an interest in FMF could only have come from his separate property."

A review of the entire record fails to support these assertions. Among other things, Hamid ignores the tracing report generated by the court's appointed expert, which was introduced into evidence at trial and formed the basis of the court's ruling against him.

For all of these reasons, we reject Hamid's challenge to the sufficiency of the evidence.

3. *Statute of Limitations*

Hamid next argues the judgment must be reversed because Sofia's claim to set aside the marital dissolution judgment is barred by the statute of limitations applicable to such set-aside requests. (Fam. Code, § 2122, subd. (f).) Once again, Hamid's factually intensive argument is unsupported by any citations to the record. But even if Hamid had attempted to support his factual contentions, we would conclude he waived any reliance on the statute of limitations because he failed to appeal from the court's earlier order, which was the order that actually granted Sofia's motion to set aside the judgment. That order was directly appealable as an order after judgment. (*Ryan v. Rosenfield* (2017) 3 Cal.5th 124, 134 [an order granting or denying a motion to vacate a judgment is appealable as "'an order made after a[n appealable] judgment'"] .) By failing to appeal from that order, Hamid waived any claim that the court erred in granting Sofia's motion to set aside the judgment.[8]

4. *The Mutual Release Contained in the Original Judgment*

Finally, Hamid contends Sofia's claim is barred by the mutual release provision incorporated into the parties' original marital dissolution. Specifically, he argues that "[t]he Judgment, *which has not been set aside*, contains [a] mutual release provision . . . [¶] . . . [¶] [which] is still operative." (Italics added.) That is incorrect. Although the record Hamid provided to us does not include the court's initial order

[8] We reject Hamid's reliance on the doctrine of laches for the same reasons. His factual assertions are again conclusory and unsupported by any citation to the record. And he waived any reliance on the defense in this court by failing to assert it in a direct appeal from the trial court's earlier order granting Sofia's motion to set aside the original judgment.

vacating portions of the marital dissolution judgment, its later statement of decision states explicitly that it did so. For Hamid to claim otherwise is specious.

5. *Sanctions*

Sofia has moved for an award of sanctions on appeal. Sanctions are appropriate when an appeal is frivolous, meaning "'it is prosecuted for an improper motive—to harass the respondent or delay the effect of an adverse judgment—or when it indisputably has no merit—when any reasonable attorney would agree that the appeal is totally and completely without merit.'" (*In re Marriage of Gong & Kwong* (2008) 163, Cal.App.4th 510, 516, quoting *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.) "'While each of the above standards provides *independent* authority for a sanctions award, in practice the two standards usually are used together "with one providing evidence of the other. Thus, the total lack of merit of an appeal is viewed as evidence that appellant must have intended it only for delay.'"" (*Ibid*.)

In this case, Hamid's appeal is completely without merit. The manner in which he presents his arguments strongly supports this conclusion. A litigant who believes in the merit of his claims spends the time necessary to draft briefs that support his factual contentions with citations to the record; such a litigant also supports his arguments with cases that appropriately relate to the legal assertions made. Hamid did neither.

An objective reading of Hamid's briefing suggests his goal in appealing was to achieve delay, rather than victory. It is his reply brief that really distills the point. There he claims for the first time that the judgment in this case is inconsistent with the judgment in his civil case involving FMF, and therefore he "intends to ask this court to take judicial notice of the conflicting finding in the civil case and to hold this appeal in abeyance until [his] appeal of the judgment in the civil case . . . is resolved." During oral

argument Hamid's counsel acknowledged that he had not followed through on this strategy, explaining, "I changed my mind."

The inference that Hamid has pursued this frivolous appeal in bad faith is further supported by the trial court's finding that he engaged in bad faith tactics in both the initial marital dissolution trial and in the trial that is the subject of this appeal. The court found he engaged in deliberate deception in both cases.

Given these circumstances, we believe an award of sanctions against Hamid is warranted. The trial court has already made a determination that Hamid is liable for both attorney fees and sanctions pursuant to section 2107, subdivision (c), a provision which authorizes an award of sanctions, including attorney fees, in cases where a party has not complied with his disclosure obligations in a marital dissolution action. The amount of such a sanctions award is left to the discretion of the court, but it is required to be "an amount sufficient to deter repetition of the conduct or comparable conduct." (§ 2107, subd. (c).) After concluding that the award of sanctions against Hamid was warranted, the trial court stayed its determination as to the amount pending the outcome of this appeal.

The amount of an appropriate award of fees and sanctions has only increased as a consequence of Hamid's conduct related to this appeal. We therefore remand the case to the trial court to consider and incorporate the additional expense and delay associated with the appellate proceedings in its determination of the proper amount of attorney fees and sanctions to award Sofia. Such sanctions may, at the sound discretion of the trial court, be assessed jointly and severally against both Hamid and his counsel.[9]

[9] When the topic of appellate sanctions was raised with Hamid's counsel during oral argument, counsel indicated he believed any such sanctions should be assessed against him rather than his client.

DISPOSITION

The judgment is affirmed. The case is remanded to the trial court with directions to proceed with its pending award of sanctions—including attorney fees—in favor of Sofia, and to consider the expense and delay associated with this appeal in setting the amount. Sofia is to recover her costs on appeal.

GOETHALS, J.

WE CONCUR:

O'LEARY, P. J.

THOMPSON, J.